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Awarding Child Support Against the Impoverished Parent: Straying from Statutory Guidelines and Using SSI in Setting the Amount

At common law, a father is bound to support his legitimate children, and the obligation continues during their minority.¹

INTRODUCTION

With these words, the United States Supreme Court articulated a concept so basic to American society that it is almost obvious; that is, parents are expected to maintain their children until they reach adulthood, regardless of whether the children live with one, both, or neither parent. Several states, through either statute or judicial declaration, have adopted this common law duty, thereby forcing parents to provide for their children until they reach the age of majority.² While the idea that every parent should be required to support his or her children is understandable, it is not always practical. As legislatures and courts are confronted with the problem of children in poverty, they are also faced with the problem of parents who are unable to support themselves, much less their children.

Poverty in the United States, particularly among children, has become a matter of increasing concern.³ In 1993, the number of persons living

¹ *Dunbar v. Dunbar*, 190 U.S. 340, 351 (1903) (holding that bankruptcy does not alleviate a father's common law duty to support his children).

² See, e.g., N.Y. FAM. CT. ACT § 413(1)(a) (McKinney Supp. 1994) ("[T]he parents of a child under the age of twenty-one years are chargeable with the support of such child and, if possessed of sufficient means or able to earn such means, shall be required to pay for child support a fair and reasonable sum as the court may determine."); *Commonwealth v. Mason*, 317 S.W.2d 166, 168 (Ky. 1958) ("The liability of the parent to support the child arose by law the moment the child was born; the divorce judgment does not create any new liability, but merely fixes its extent."); *In re Keiffer*, No. 1189, 1984 WL 3478, at *4 (Ohio Ct. App. May 15, 1984) (Grey, J., dissenting) ("Every parent is obligated to support his or her child.").

³ In 1993, after the Census Bureau issued a report stating that the number of people below the poverty line had increased for the third consecutive year, the House Subcommittee on Human Resources held a hearing to investigate the prevalence of

in poverty reached a level greater than any year since 1983;⁴ approximately 39.3 million people, about 15.1% of the country's population, were living below the level of income determined by the federal government to be the poverty line.⁵ Those living in the southern states, where the poverty rate was 16.9%, were most likely to be poor.⁶ In Kentucky, the average number of people living in poverty between 1990 and 1992 was 18.6%.⁷ In comparison, Mississippi, the state with the highest poverty rate in the nation, reported a poverty rate of 24.6%, while Delaware, the state with the lowest poverty rate, reported a rate of 7.3%.⁸ Kentucky's poverty rate rose from 19.7% in 1992 to 20.4% in 1993.⁹

Children, who make up about one quarter of the general population yet comprise 40.1% of the nation's poor,¹⁰ are more likely to live in poverty than are persons in other age groups.¹¹ In 1992, 21.9% of the nation's minors lived in poverty, compared to 11.7% of persons aged eighteen to sixty-four and 12.9% of those sixty-five and older.¹² In 1993, the number of children living below the poverty line increased to 22.7%, a number that exceeded figures for every year since 1964.¹³

The fact that 78.8% of families with an income level beneath the poverty line are families that include children indicates the severity of the problem.¹⁴ The economic condition of children generally reflects that of their parents, and children living below the poverty line frequently come from homes with only one parent.¹⁵ In 1993, 35.6% of households

poverty in the United States. *Historical Trends in Poverty and Family Income: Hearing Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. 4 (1993). Harold E. Ford, chairman of the subcommittee, opened the hearing by saying, "[W]e should be alarmed at some of the long-term trends and what they mean for the working people of this country — especially families with children and low-skilled workers." *Id.* at 5.

⁴ R.A. Zaldivar, *Poverty Rate Highest in Decade; Economic Recovery Not Reaching 15.1% of Nation, Report Says*, ARIZ. REPUBLIC, Oct. 7, 1994, at A1. In 1983, 15.2% of Americans lived in poverty. *Id.*

⁵ *Id.* In 1993, the poverty line was measured at an annual income of \$14,763 for a family of four persons. *Id.*

⁶ BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *POVERTY IN THE UNITED STATES: 1992*, at xi (1993) [hereinafter BUREAU OF THE CENSUS].

⁷ *Id.*

⁸ *Id.*

⁹ Zaldivar, *supra* note 4, at A1.

¹⁰ *Id.*

¹¹ BUREAU OF THE CENSUS, *supra* note 6, at x.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* For an examination of the standard of living after a divorce for families with

managed only by a female parent lived in poverty while only 6.5% of households headed by two married adults fell below the poverty line.¹⁶ The status of a one-parent household even more dramatically affects the incidence of poverty in families with younger children.¹⁷ For example, 65% of children under six years old who resided with one female parent lived in poverty while only 12.8% of children under six who resided with married parents lived in poverty.¹⁸

However compelling statistics may seem, the nature of statistics does not allow one to see beyond the numbers. The limitations of statistics tend to obscure the much deeper problems that poverty can create.

Living in poverty is more than just a lack of money. It defines the very way that children live. . . . [I]t means living in deteriorating housing in violent neighborhoods and being sick and hungry.

Children who grow up poor are a much greater risk for dropping out of school, having health problems their whole lives, being abused and neglected, and being poor and unemployed when they're adults.¹⁹

To alleviate the plight of children in poverty, society has turned to legislatures and courts. In response, these bodies have passed and enforced, respectively, provisions which advance the award and collection of child support.

In 1984, Congress enacted amendments to the Child Support Enforcement Act²⁰ to facilitate the collection of child support and to make child support awards more uniform throughout each state.²¹ These amendments required states to implement guidelines for determining how much child support to award.²² Before the amendments became effective,

children, see Marilyn R. Smith, *Standard of Living: The Benchmark for Measuring the Adequacy of Child Support Guidelines*, ESSENTIALS OF CHILD SUPPORT GUIDELINES DEV.: ECON. ISSUES & POL'Y CONSIDERATIONS (Proceedings of the Women's Legal Defense Fund Nat'l Conference on the Dev. of Child Support Guidelines, Queenstown, Md.), Sept. 1986, at 221.

¹⁶ Zaldivar, *supra* note 4, at A1.

¹⁷ BUREAU OF THE CENSUS, *supra* note 6, at x.

¹⁸ *Id.*

¹⁹ Zaldivar, *supra* note 4, at A1 (quoting Dana Naimark, fiscal project manager, Children's Action Alliance).

²⁰ The current version of the Act is located at 42 U.S.C. §§ 651-662 (1988 & Supp. 1994).

²¹ ADVISORY PANEL ON CHILD SUPPORT GUIDELINES, U.S. DEP'T OF HEALTH & HUMAN SERVS., DEVELOPMENT OF GUIDELINES FOR CHILD SUPPORT ORDERS: ADVISORY PANEL RECOMMENDATIONS AND FINAL REPORT II-1 to II-2 (1987).

²² *Id.*

the majority of states had not enacted guidelines or established any system for determining how much child support to award in a given case.²³ By forcing them to create a uniform system, Congress intended "to address several deficiencies in the traditional case-by-case method of setting amounts for child support orders."²⁴ These deficiencies included "(1) a shortfall in the adequacy of orders, when compared with the true costs of rearing children as measured by economic studies; (2) inconsistent orders causing inequitable treatment of parties in similarly situated cases; and (3) inefficient adjudication of child support amounts in the absence of uniform standards."²⁵ However, even when implemented, these guidelines provide courts with little guidance in determining what to do when faced with a child in need of support from a parent incapable of supporting himself or herself, much less the child.

Part I of this Note examines the ways in which states have attempted to deal with parents living below the poverty line by discussing the circumstances under which courts can decline to apply statutory child support guidelines and the alternatives to applying these guidelines.²⁶ Part II discusses the Kentucky General Assembly's attempt to make more parental income accessible to children by allowing public assistance in the form of Supplemental Security Income ("SSI") benefits to be used in determining the child support award against a non-custodial parent.²⁷ This Note concludes that courts should balance the financial abilities and needs of both the non-custodial parent and the child in determining whether to award child support but that the inclusion of SSI benefits into the equation is impermissible.²⁸

I. CONFRONTING THE PROBLEM OF IMPOVERISHED PARENTS

A. *Straying from Statutory Guidelines*

Some states, like Kentucky, have statutes that impose a minimum support requirement on the non-custodial parent.²⁹ The Kentucky

²³ *Id.*

²⁴ *Id.* at II-2.

²⁵ *Id.*

²⁶ See *infra* notes 29-76 and accompanying text.

²⁷ See *infra* notes 77-187 and accompanying text.

²⁸ See *infra* notes 188-92 and accompanying text.

²⁹ See, e.g., KY. REV. STAT. ANN. § 403.212(4) (Michie/Bobbs-Merrill Supp. 1994) (establishing a minimum support amount of \$60 per month); N.Y. FAM. CT. ACT § 413(1)(d) (McKinney Supp. 1994) (establishing a minimum support amount of either

guidelines, however, only “serve as a rebuttable presumption for the establishment or modification of the amount of child support.”³⁰ The Kentucky approach allows courts to stray from the guidelines when “their application would be unjust or inappropriate,”³¹ but it narrows the circumstances under which a court can elect to not apply the guidelines to the following:

- (a) A child’s extraordinary medical or dental needs;
- (b) A child’s extraordinary educational, job training, or special needs;
- (c) Either parent’s own extraordinary needs, such as medical expenses;
- (d) The independent financial resources, if any, of the child or children;
- (e) Combined parental income in excess of the Kentucky child support guidelines;
- (f) The parents of the child, having demonstrated knowledge of the amount of child support established by the Kentucky child support guidelines, have agreed to child support different from the guideline amount. However, no such agreement shall be the basis of any deviation if public assistance is being paid on behalf of a child under the provisions of Part D of Title IV of the Federal Social Security Act; and
- (g) Any similar factor of an extraordinary nature specifically identified by the court which would make application of the guidelines inappropriate.³²

New York’s Family Court Act includes a similar provision which permits the court to deviate from the child support guidelines if “the non-custodial parents’s [sic] pro-rata share of the basic child support obligation is unjust or inappropriate.”³³ In setting a child support amount under this provision, the court can order whatever support it deems equitable by taking into account the circumstances of the parties.³⁴

\$25 or \$50 per month, depending on the financial status of the parent).

³⁰ KY. REV. STAT. ANN. § 403.211(2) (Michie/Bobbs-Merrill Supp. 1994).

³¹ *Id.*

³² *Id.* § 403.211(3).

³³ N.Y. FAM. CT. ACT § 413(1)(f) (McKinney Supp. 1994) (footnote omitted).

³⁴ *Id.* The statute allows a court to take the following factors into account:

- (1) The financial resources of the custodial and non-custodial parent, and those of the child;
- (2) The physical and emotional health of the child and his/her special needs and aptitudes;

Alaska's child support guidelines adopt a policy consistent with that of New York and Kentucky. Its guidelines include a provision permitting "the trial court to vary the child support award that would be due under [the guidelines] for 'good cause.'"³⁵ Good cause for deviating exists if the court "find[s] that the parent with the child support obligation has a gross income which is below the poverty level as set forth in the Federal Register."³⁶

In comparison, the discretionary provision for departing from the statutory guidelines in Kentucky only creates a basis for arguing that an impoverished individual should not have to pay the statutory minimum.³⁷ The argument would be that the parent's poverty is a "factor of an extraordinary nature . . . which would make application of the guidelines inappropriate."³⁸ The statute furthers this argument by saying that what is considered "extraordinary" is to "be determined by the court in its discretion."³⁹ This discretion allows Kentucky courts to refrain from using the statutory guidelines after taking the facts of each case,

(3) The standard of living the child would have enjoyed had the marriage or household not been dissolved;

(4) The tax consequences to the parties;

(5) The non-monetary contributions that the parents will make toward the care and well-being of the child;

(6) The educational needs of either parent;

(7) A determination that the gross income of one parent is substantially less than the other parent's gross income;

(8) The needs of the children of the non-custodial parent for whom the non-custodial parent is providing support who are not subject to the instant action and whose support has not been deducted from income . . . and the financial resources of any person obligated to support such children, provided, however, that this factor may apply only if the resources available to support such children are less than the resources available to support the children who are subject to the instant action;

(9) Provided that the child is not on public assistance (i) extraordinary expenses incurred by the non-custodial parent in exercising visitation, or (ii) expenses incurred by the non-custodial parent in extended visitation provided that the custodial parent's expenses are substantially reduced as a result thereof; and

(10) Any other factors the court determines are relevant in each case

Id.

³⁵ *Carstens v. Carstens*, 867 P.2d 805, 809 (Alaska 1994) (quoting ALASKA R. CIV. P. 90.3(c)(1)(B)).

³⁶ ALASKA R. CIV. P. 90.3(c)(1)(B).

³⁷ See *supra* note 32 and accompanying text.

³⁸ KY. REV. STAT. ANN. § 403.211(3)(g).

³⁹ *Id.* § 403.211(4).

including a parent's poverty, into consideration. The Alaska provision, on the other hand, goes even further by stating that poverty *is* a sufficient reason to deviate from the guidelines.⁴⁰ Kentucky's provision is not as clear as that of Alaska; thus, while paragraph (g) seems to provide justification for excusing an impoverished parent from paying child support, a Kentucky court need not read the statute this broadly.

Once a court has decided not to follow statutory or administrative guidelines for setting the amount of child support, it must then determine what action to take with respect to the impoverished parent. One method of handling the problem is to excuse the impoverished parent from making the payments so long as the parent remains in such poor financial condition.⁴¹ The *In re Koch* court construed Oregon's child support guidelines to be consistent with this principle, recognizing that "[a]lthough the first priority is to provide adequate support for the children, the amount of support required of the obligated parent must not exceed the ability to pay and must not preclude the ability to support oneself."⁴²

Likewise, New York has a statutory provision requiring that a court, in setting a child support award, consider the non-custodial parent's resources and whether that parent would be able to make the payments.⁴³ In *Moore v. Sharp*, a New York appellate court invalidated an award of child support against a non-custodial parent because the court making the award had failed to take the parent's "ability to pay" into account.⁴⁴ The lower court had awarded child support against the non-custodial parent, who was mentally retarded, in the amount of fifty dollars per week for the support of his two children despite his low level of income.⁴⁵

In addition to excusing the impoverished parent from making any child support payments, most courts have the ability to reduce a parent's child support obligation in response to the parent's poverty.⁴⁶ The courts in these jurisdictions abide by the rule that "[t]he impact of child support

⁴⁰ ALASKA R. CIV. P. 90.3(c)(1)(B).

⁴¹ See, e.g., *Rose v. Mooney*, 629 N.E.2d 378, 381 (N.Y. 1993), *cert. denied*, 114 S. Ct. 1837 (1994) (explaining that because the non-custodial parent "has nothing, she can pay nothing"); *Moore v. Sharp*, 532 N.Y.S.2d 811 (App. Div. 1988); *In re Koch*, 823 P.2d 442 (Or. Ct. App. 1991).

⁴² 823 P.2d at 444.

⁴³ N.Y. FAM. CT. ACT § 545 (McKinney 1993 & Supp. 1994).

⁴⁴ 532 N.Y.S.2d at 812.

⁴⁵ *Id.* The non-custodial parent's income consisted of \$404 per month in SSI benefits and \$27 per month in Social Security Disabled Adult Child's benefits. *Id.*

⁴⁶ See, e.g., *South v. South*, No. FA 89-0289403, 1992 WL 189319, at *2 (Conn. Super. Ct. July 31, 1992) (mem.).

payments [on] those with incomes close to the poverty level is particularly severe and cries for careful consideration."⁴⁷

When courts are deciding whether to deviate from statutory guidelines, they often balance the child's interest against the parent's financial abilities.⁴⁸ In Ohio, for example, a "trial court has discretion to award child support based upon the obligor's means and the children's needs."⁴⁹ In *Jewett v. Jewett*, both parents received public assistance, which rendered Ohio's child support guidelines inapplicable.⁵⁰ The court, applying the principle that the financial situation of each parent as well as the children's financial demands should be taken into consideration, set an amount of child support that it deemed equitable.⁵¹ However, courts are not as accommodating when they determine that the parent is impoverished by his or her own choice.

B. Voluntary Impoverishment: A Means for Courts to Apply Statutory Guidelines to Those Without Income

Legislatures have created a means for the judicial system to impose child support obligations on a person that the court believes to be poor by that person's own choice.⁵² For example, if a court deems a parent to be capable of work yet unemployed or underemployed, then the court can declare that the individual has voluntarily impoverished himself or herself.⁵³ One court has defined voluntary impoverishment as "freely or by an act of choice . . . reduc[ing] oneself to poverty or depriv[ing] oneself of resources with the intention of avoiding child support or spousal obligations."⁵⁴ If the court finds the parent to be voluntarily impoverished, Maryland law requires the parent to pay child support

⁴⁷ *Id.*

⁴⁸ See, e.g., *Jewett v. Jewett*, No. 90-A-1544, 1991 WL 116988, at *3 (Ohio Ct. App. June 28, 1991).

⁴⁹ *Id.* at *3 (citation omitted).

⁵⁰ *Id.* The custodial parent received AFDC benefits, while the non-custodial parent received SSI benefits. *Id.*

⁵¹ *Id.* The court determined that, based on the non-custodial parent's income (\$566 per month in SSI benefits and \$10 per month in food stamps) and the children's economic needs, child support was properly awarded in the amount of \$40. *Id.*

⁵² See, e.g., KY. REV. STAT. ANN. § 403.212(2)(d) (*Michie/Bobbs-Merrill Supp.* 1994); MD. CODE ANN., FAM. LAW § 12-204(b) (1991).

⁵³ See, e.g., *Goldberger v. Goldberger*, 624 A.2d 1328, 1334 (Md. Ct. Spec. App.), cert. denied, 632 A.2d 150 (Md. 1993); *John O. v. Jane O.*, 601 A.2d 149, 155-56 (Md. Ct. Spec. App. 1992).

⁵⁴ *John O.*, 601 A.2d at 156.

based upon his or her "potential income."⁵⁵ Kentucky law likewise provides that "[i]f a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income"⁵⁶

In Maryland, a court considers the following circumstances when determining whether a person has voluntarily become impoverished:

- (1) his or her current physical condition;
- (2) his or her respective level of education;
- (3) the timing of any change in employment or other financial circumstances relative to the divorce proceedings;
- (4) the relationship between the parties prior to the initiation of divorce proceedings;
- (5) his or her efforts to find and retain employment;
- (6) his or her efforts to secure retraining if that is needed;
- (7) whether he or she has ever withheld support;
- (8) his or her past work history;
- (9) the area in which the parties live and the status of the job market there; and
- (10) any other considerations presented by either party.⁵⁷

In *Goldberger v. Goldberger*, the court found that a parent had voluntarily impoverished himself by devoting his life to the study of the Talmud and the Torah and awarded child support against him.⁵⁸ This non-custodial parent had been supported throughout his career as a

⁵⁵ MD. CODE ANN., FAM. LAW § 12-204(b).

⁵⁶ KY. REV. STAT. ANN. § 403.212(2)(d) (Michie/Bobbs-Merrill Supp. 1994). The entire provision reads:

If a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income, except that a determination of potential income shall not be made for a parent who is physically or mentally incapacitated or is caring for a very young child, age three (3) or younger, for whom the parents owe a joint legal responsibility. Potential income shall be determined based upon employment potential and probable earnings level based on the obligor's recent work history, occupational qualifications, and prevailing job opportunities and earnings levels in the community. A court may find a parent to be voluntarily unemployed or underemployed without finding that the parent intended to avoid or reduce the child support obligation.

Id.

⁵⁷ *John O.*, 601 A.2d at 156-57.

⁵⁸ 624 A.2d 1328, 1333 (Md. Ct. Spec. App.), *cert. denied*, 632 A.2d 150 (Md. 1993).

student by family and friends and had thereby been allowed to devote all of his time to academic pursuits.⁵⁹

In ordering the non-custodial parent to support his six children, the court relied upon a judicially mandated duty "of parents to support their minor children."⁶⁰ The court also considered the intent of the legislature in enacting a statute that imputed potential income to a parent.⁶¹ The court reasoned that the legislative intent "was to implement state and federal policy of requiring adequate support by precluding parents from avoiding their obligation by deliberately not earning what they could earn."⁶²

In a contrasting result, a Michigan court allowed a non-custodial parent's child support obligation to be reduced because of his enlistment in a religious community that required a vow of poverty.⁶³ As a member of this religious organization, the non-custodial parent received "a place to live and a food allowance for [his family], and [was] paid a stipend roughly commensurate with the poverty level of the nation to which [he was] assigned."⁶⁴ The "stipend" earned by this parent varied from eighty-four dollars per month when he worked in the United States to twelve dollars per month when he worked in India.⁶⁵ The court refused to award child support based upon the non-custodial parent's "unexercised ability to earn" because it perceived that the vow of poverty was taken honestly and not because the parent did not want to support his children.⁶⁶

These inconsistent results highlight the broad discretion that courts have in determining whether a parent is voluntarily impoverished. While the court in *Dunn* was sympathetic to the parent's religious vocation, the *Goldberger* court was not, even though in each case the parent chose a lifestyle that prevented him from supporting his children. A problem arises when the court applies its own values to the situation because the

⁵⁹ *Id.*

⁶⁰ *Id.* (citing *Dunbar v. Dunbar*, 190 U.S. 340 (1903)).

⁶¹ *Id.* at 1334. The relevant Maryland statute defines income of a parent as "(1) actual income of a parent if the parent is employed to full capacity; or (2) potential income of a parent, if the parent is voluntarily impoverished." MD. CODE ANN., FAM. LAW § 12-201(b) (1991).

⁶² *Goldberger*, 624 A.2d at 1334.

⁶³ *Dunn v. Dunn*, 307 N.W.2d 424, 426 (Mich. Ct. App. 1981) (per curiam).

⁶⁴ *Id.* at 425.

⁶⁵ *Id.*

⁶⁶ *Id.* at 426. Compare the Kentucky provision, quoted *supra* note 56, which directs that intent "to avoid or reduce the child support obligation" is not required for a parent to be found voluntarily underemployed or unemployed.

court has the power to declare an unsympathetic individual to be voluntarily impoverished and award support accordingly. This award may place a greater burden on the parent to survive as well as attaching to that person the stigma of being a delinquent parent. This approach sometimes fails to recognize that there are times when the parent's inability to support his or her children is not truly voluntary.

C. *The Extreme Solution: Terminating Parental Rights*

In Ohio, when a parent does not support his or her child the court can order the severance of the parent's legal relationship with the child.⁶⁷ This extreme method of solving the problem of awarding child support against an impoverished parent was implemented by the court in *In re Keiffer*.⁶⁸ In that case, the court of appeals determined that the spouse of the custodial parent could adopt a child despite the objections of the non-custodial parent because the non-custodial parent had "made no direct contribution to the support of the child."⁶⁹ The court took the non-custodial parent's economic situation into consideration but rejected it as a basis for excusing the nonpayment of child support.⁷⁰ The court concluded "that under the evidence reasonable minds could fairly find that [the non-custodial parent] did not have justifiable cause to not make some payments, however meager, for the maintenance and support of the child."⁷¹

The dissenting opinion focused on the financial position of the non-custodial parent, noting "that she was able to work only two months in a year, made only \$2000.00, and had to obtain help from the state and her relatives for her own support."⁷² Pointing out the absence of a court

⁶⁷ Ohio legislation provides:

Consent to adoption is not required [if] . . .

. . . [a] parent of a minor . . . has failed without justifiable cause to communicate with the minor or to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year immediately preceding either the filing of the adoption petition or the placement of the minor in the home of the petitioner.

OHIO REV. CODE ANN. § 3107.07 (Anderson 1993) (emphasis added).

⁶⁸ No. 1189, 1984 WL 3478 (Ohio Ct. App. May 15, 1984).

⁶⁹ *Id.* at *3. The non-custodial parent reported an annual income of \$2000 from her own employment and \$10,000 as a result of her husband's employment. *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* The court also noted that while the custodial parent had requested financial help in paying for the cost of caring for the children, the non-custodial parent had responded only by infrequently making small contributions. *Id.*

⁷² *Id.* (Gray, J., dissenting).

order requiring support, the dissent took issue with the majority's characterization of purchases made by the non-custodial parent as "gifts."⁷³ The dissent continued: "If a parent is not under an order to pay a certain amount, then any amount contributed would have to be considered a gift" even when the non-custodial parent has "supplied what little she could in the form of clothing, toys, cards and small amounts of cash."⁷⁴ In criticizing the majority and the trial court for penalizing the non-custodial parent because she "did not contribute enough,"⁷⁵ the dissent stated that "[t]he majority decision violates both the letter and the spirit of R.C. 3107.06 and R.C. 3107.07, which are intended to deal with situations where the non-custodial parent has effectively abandoned the child by a complete failure of support."⁷⁶

II. THE AVAILABILITY OF SSI BENEFITS FOR CHILD SUPPORT

The difficulty of awarding child support against a person living at or below the subsistence level can be compounded by their reliance upon public assistance as a form of income. The benefits received through programs such as SSI are often subject to federal regulations which limit the ability of legislatures and courts to make a child support award against the recipient.

A. *Supplemental Security Income: History and Purpose*

In enacting the SSI program,⁷⁷ Congress created a "program [that] was intended '[t]o assist those who cannot work because of age, blindness, or disability' by 'set[ting] a Federal guaranteed minimum income level.'"⁷⁸ The purpose of SSI is to furnish "a subsistence allowance, under federal standards, to the Nation's needy[,] aged, blind, and disabled," including persons "'unable to engage in any substantial

⁷³ *Id.* (Gray, J., dissenting).

⁷⁴ *Id.* (Gray, J., dissenting).

⁷⁵ *Id.* at *4 (Gray, J., dissenting).

⁷⁶ *Id.* (Gray, J., dissenting); *see also supra* note 67. The dissent continued, "This mother did not abandon her child, not morally, not legally, not emotionally, not financially. The decision of the trial court that she did is absolutely wrong!" *Keiffer*, 1984 WL 3478, at *4 (Gray, J., dissenting).

⁷⁷ 42 U.S.C. § 1381-1383 (1991 & Supp. 1994); *see* 81 C.J.S. *Social Sec.* §§ 93-94 (1977); SOCIAL SEC. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., SSA PUB. NO. 05-11015, A GUIDE TO SUPPLEMENTAL SECURITY INCOME (1985).

⁷⁸ *Schweiker v. Wilson*, 450 U.S. 221, 223 (1981) (second and third alterations in original) (citation omitted) (quoting S. REP. NO. 1230, 92d Cong., 2d Sess. 4, 12 (1972)).

gainful activity by reason of any medically determinable physical or mental impairment.”⁷⁹ To qualify for SSI, an individual must be over sixty-five years old, or blind,⁸⁰ or disabled,⁸¹ with an income of less than \$446 per month for a single person or less than \$669 per month for a couple.⁸² In addition, the program requires that any personal assets total less than \$2000 for a single person or less than \$3000 for a couple⁸³ and that the applicant be a U.S. citizen or have permanent residency status.⁸⁴ Recipients of SSI receive a monthly check, have their Medicare premiums paid,⁸⁵ and, depending upon their state of residence, receive food stamps and other social services from state agencies.⁸⁶

When Congress amended the Social Security Act to create the SSI program, it made the program subject to 42 U.S.C. § 407, thereby giving “SSI benefits the same protection from legal process, such as garnishment or attachment, that had previously been granted to Social Security disability benefits.”⁸⁷ Section 407(a) restricts the use of SSI benefits, stating, “The right of any person to any future payment under this

⁷⁹ *Id.* at 223-24 (quoting 42 U.S.C. § 1382(a)(3)(A)).

⁸⁰ To be blind, one must have “[c]orrected vision of 20/200 or less in [the] better eye” and a “[f]ield of vision less than 20 degrees.” SOCIAL SEC. ADMIN., U.S. DEP’T OF HEALTH & HUMAN SERVS., SSA PUB. NO. 05-11001, A DESKTOP GUIDE TO SSI ELIGIBILITY REQUIREMENTS (1994) [hereinafter DESKTOP GUIDE TO SSI]; *see also* S. REP. NO. 1230, 92d Cong., 2d Sess. 384 (1972) (defining blind to include “the particular sight limitation referred to as ‘tunnel vision’”).

⁸¹ To be disabled, a person must suffer from “[p]hysical or mental impairment that keeps a person from performing any ‘substantial’ work and is expected to last 12 months or result in death.” DESKTOP GUIDE TO SSI, *supra* note 80.

Federal law provides:

[A]n individual shall be determined to be under a disability only if his . . . impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

42 U.S.C. § 1382(a)(3)(B) (1991 & Supp. 1994).

⁸² DESKTOP GUIDE TO SSI, *supra* note 80. These amounts exclude some forms of income, such as food stamps and aid for housing or energy needs. *Id.*

⁸³ *Id.* These amounts exclude the person’s home, his or her car, burial plots for the individual and his or her immediate family, burial funds up to \$1500, and life insurance valued at \$1500 or less. *Id.*

⁸⁴ *Id.*

⁸⁵ As for Medicaid, some states require SSI recipients to apply separately with the state, while other states automatically provide Medicaid. *Id.*

⁸⁶ *Id.*

⁸⁷ Tennessee Dep’t of Human Servs. v. Young, 802 S.W.2d 594, 595 (Tenn. 1990).

subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process"⁸⁸

Congress subsequently passed the Child Support Enforcement Act,⁸⁹ including a provision waiving the exemption of benefits from legal process under 42 U.S.C. § 407(a) in order to facilitate the collection of child support.⁹⁰ Therefore, courts can collect child support through "entitlements 'based upon remuneration for employment.'"⁹¹ Benefits based on "remuneration for employment" are those calculated "based upon the wages earned during employment [and] are attachable pursuant to § 659(a)" of the Child Support Enforcement Act.⁹² Courts, with one notable exception, have generally held SSI benefits to be unattachable despite § 659(a).⁹³ The majority view is consistent with federal regulations that enumerate the forms of income that remain free from garnishment.⁹⁴

Since the SSI program does not appear to be subject to § 659(a) of the Child Support Enforcement Act and remains subject to the anti-attachment measures embodied in § 407(a), a strong argument exists that these federal laws prevent the attachment of SSI benefits by state courts. In the past, the Supreme Court has prohibited the attachment of federal benefits in the areas of military retirement⁹⁵ and railroad retirement income,⁹⁶ reasoning that federal law regarding these programs "com-

⁸⁸ 42 U.S.C. § 407(a) (1991).

⁸⁹ *Id.* § 659(a) (1991).

⁹⁰ *Id.*

⁹¹ *Becker County Human Servs. v. Peppel*, 493 N.W.2d 573, 575 (Minn. Ct. App. 1992) (quoting 42 U.S.C. § 659(a) (1988)).

⁹² *Id.*

⁹³ *E.g., Peppel*, 493 N.W.2d at 575; *Tennessee Dep't of Human Servs. v. Young*, 802 S.W.2d 594, 594 (Tenn. 1990). The one notable exception is *Griggs v. Griggs*, 435 So. 2d 103, 105 (Ala. Civ. App. 1983), which noted: "[E]xemption statutes, such as 42 U.S.C. § 407 (1976), are aimed to protect the recipient's family as well as the recipient himself." *See infra* notes 160-65 and accompanying text.

⁹⁴ 5 C.F.R. § 581.104 (1994). "Moneys which are not subject to garnishment" include, among others, "Supplemental Security Income (SSI) payments pursuant to sections 1381 *et seq.*, of title 42 of the United States Code (title XVI of the Social Security Act)." *Id.*

⁹⁵ *McCarty v. McCarty*, 453 U.S. 210, 235 (1981). The Uniformed Services Former Spouses' Protection Act, current version at 10 U.S.C. § 1408 (1988 & Supp. V 1993), superseded this ruling and made it permissible for state courts to award support based on military retirement benefits. *See Mansell v. Mansell*, 490 U.S. 581, 594-95 (1989).

⁹⁶ *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590 (1978). The Court held that payments

pletely pre-empted the application of state community property law.”⁹⁷ These unusual intrusions into family law, normally the province of the states,⁹⁸ occurred because the “Court, even in [this] area, has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights.”⁹⁹ This preemption argument has been used by some courts in determining that child support cannot be awarded against a recipient of SSI benefits.¹⁰⁰

B. Kentucky's Amended Statute

The presence of poverty in Kentucky is astounding, as “[o]ne of every two children in Kentucky lives in a family unable to provide a minimal standard of living”¹⁰¹ The condition of Kentucky's children reflects the prevalence of poverty among all Kentuckians, especially those in particular areas of the state. Kentucky has seven of the twenty-five poorest counties in the United States.¹⁰² In McCreary County, the poorest of Kentucky's counties, the per capita level of personal income is \$7663 per year, compared to \$18,696 per year for each resident in the rest of the country.¹⁰³ Poverty is greatest in Appala-

received through the Railroad Retirement Act, current version at 45 U.S.C. §§ 231-231v (1988 & Supp. V 1993), were not part of a couple's community property in a divorce proceeding.

⁹⁷ *Mansell*, 490 U.S. at 588.

⁹⁸ *Rose v. Rose*, 481 U.S. 619, 625 (1987) (“We have consistently recognized that ‘[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.’” (alteration in original) (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890))).

⁹⁹ *Ridgway v. Ridgway*, 454 U.S. 46, 54 (1981) (holding that a serviceman could select the beneficiary of his group life insurance policy despite a state court order requiring him to make his children the beneficiaries of the policy).

¹⁰⁰ See *Tennessee Dep't of Human Servs. v. Young*, 802 S.W.2d 594, 595 (Tenn. 1990); *Becker County Human Servs. v. Peppel*, 493 N.W.2d 573, 574 (Minn. Ct. App. 1992).

¹⁰¹ M. David Goodwin, *Some Improvement Seen in Welfare of Children in State*, *Report Says*, *COURIER-JOURNAL* (Louisville), Dec. 14, 1993, at B6.

¹⁰² Mike Brown, *7 Counties in Kentucky Among Nation's Poorest*, *COURIER-JOURNAL* (Louisville), Sept. 5, 1994, at B4. These counties, including McCreary, Elliot, Menifee, Jackson, Owsley, and Clay, are predominantly in eastern Kentucky. The exception is Edmonson County, which is located in central Kentucky.

¹⁰³ *Id.*

chia, where one quarter of the population live in poverty and twenty percent of all children live below the poverty line.¹⁰⁴

In Kentucky, where almost twenty percent of children live with only one parent,¹⁰⁵ the poverty rate increases for those children living in single parent families, particularly when that single parent is female.¹⁰⁶ Sixty-four percent of families with a female head of household in the Appalachian region of Kentucky lived below the poverty line in 1990.¹⁰⁷ In some areas of eastern Kentucky, one hundred percent of families with a female head of household lived below the poverty line.¹⁰⁸

In 1994, the Kentucky General Assembly expanded the ability of children of impoverished parents to receive child support by broadening the definition of gross income to include income received through SSI benefits.¹⁰⁹ Like most other states, Kentucky determines the amount of child support required of the non-custodial parent based on that parent's "gross income," which, before the 1994 amendment, included "income from salaries, wages, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, gifts, prizes, and alimony or maintenance received."¹¹⁰ Once the gross income of each parent is determined, the two incomes are added together to find the "combined adjusted parental gross income."¹¹¹ Then, based upon the number of children, the court sets the amount of maintenance for which the parents are responsible.¹¹² Each parent pays a portion of the amount in proportion to that parent's adjusted gross income.¹¹³

¹⁰⁴ *Appalachia Poverty Worse*, COMMERCIAL APPEAL (Memphis), Aug. 20, 1994, at B3.

¹⁰⁵ Goodwin, *supra* note 101, at B6.

¹⁰⁶ Allen G. Breed, *Single Appalachian Mothers Start to Break Cycle of Poverty, Degradation*, L.A. TIMES, July 3, 1994, at A11.

¹⁰⁷ *Id.* These statistics were part of a report prepared by Child Trends, Inc., Washington, D.C. *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Before this amendment to § 403.212(2)(b) of the Kentucky Revised Statutes, the statute's definition of gross income "[s]pecifically excluded . . . benefits received from means-tested public assistance programs, including but not limited to Aid to Families with Dependent Children (AFDC), Supplemental Security Income (SSI) and food stamps." KY. REV. STAT. ANN. § 403.212(2)(b) (Michie/Bobbs-Merrill 1993).

¹¹⁰ *Id.* After the amendment in 1994, this list specifically included "Supplementary Security Income." *Id.* (Michie/Bobbs-Merrill Supp. 1994).

¹¹¹ *Id.* § 403.212(2).

¹¹² *Id.*

¹¹³ *Id.* § 403.212(3).

The expansion of the definition of gross income to include SSI benefits allows Kentucky's courts to reach the income of parents who had previously been exempted from the payment of child support. This expansion is especially significant since approximately "42.7 percent of persons below the poverty level in 1992 received means-tested cash assistance."¹¹⁴ Means-tested cash assistance includes programs such as AFDC,¹¹⁵ SSI,¹¹⁶ Medicaid benefits,¹¹⁷ food stamps,¹¹⁸ and rent subsidies.¹¹⁹ Kentucky's amended statute, while it makes additional financial resources available to the children of SSI recipients, is problematic since most courts do not allow SSI to be considered when setting child support.¹²⁰

C. Judicial Construction of Federal Statutes Pertaining to the Supplemental Security Income Program

1. The Exclusion of SSI Benefits from Attachment for Child Support

Several state courts have addressed the question of whether SSI benefits are available for child support payments.¹²¹ Most courts

¹¹⁴ BUREAU OF THE CENSUS, *supra* note 6, at xvii-xviii.

¹¹⁵ AFDC provides financial support to children who do not have the benefit of monetary assistance from one of their parents because that parent is "continuously absent from home, incapacitated, dead, or unemployed." *Id.* at A-4.

¹¹⁶ See *supra* notes 77-100 and accompanying text.

¹¹⁷ "The Medicaid Program is designed 'to furnish medical assistance on behalf of needy families with dependent children, and of aged, blind, or permanently and totally disabled individuals whose incomes and resources are insufficient to meet the cost of necessary medical services.'" BUREAU OF THE CENSUS, *supra* note 6, at A-5 (quoting Social Security Amendments of 1965, Pub. L. No. 89-97, § 121(a), 79 Stat. 286, 343 (codified at 42 U.S.C. §§ 1396-1396d (1988 & Supp. V 1993))). Most individuals eligible for SSI are also eligible for Medicaid. *Id.*

¹¹⁸ The food stamp program is a federal public assistance program that gives eligible persons coupons for the purchase of food, thereby "'permit[ting] low-income households to obtain a more nutritious diet.'" *Id.* at A-5 (quoting Food and Agriculture Act of 1977, Pub. L. No. 95-113, § 1301, 91 Stat. 913, 958 (codified at 7 U.S.C. § 2011 (1988 & Supp. V 1993)) (amending the Food Stamp Act of 1964, as amended)).

¹¹⁹ Rent subsidies provide monetary assistance to low-income families by paying "[t]he difference between the 'fair market' rent and the rent charged to the tenant." *Id.* at A-4 to A-5.

¹²⁰ See *infra* notes 124-59 and accompanying text.

¹²¹ See *Griggs v. Griggs*, 435 So. 2d 103 (Ala. Civ. App. 1983); *Becker County Human Servs. v. Peppel*, 493 N.W.2d 573 (Minn. Ct. App. 1992); *Whitmore v. Kenney*, 626 A.2d 1180 (Pa. Super. Ct. 1993); *Tennessee Dep't of Human Servs. v. Young*, 802

considering the problem have rejected the use of SSI in determining child support.¹²² These courts have reasoned that both federal statutory provisions governing SSI and congressional intent in creating the program preclude the inclusion of SSI in gross income because any attempt to compel payment is an endeavor to subject SSI to legal process.¹²³

The case that has most thoroughly addressed the issue of whether SSI benefits can be used for child support is *Tennessee Department of Human Services v. Young*.¹²⁴ In this case, the state of Tennessee attempted to collect child support payments from a non-custodial parent who had been ordered to make payments of \$100 per month.¹²⁵ These payments were to be made to the state as partial compensation for the AFDC benefits being given to the custodial parent.¹²⁶ After making some initial payments, the non-custodial parent, whose only income was \$386 per month in SSI benefits, stopped making child support payments, whereupon a court garnished his SSI benefits.¹²⁷

To support its conclusion that SSI benefits could not be garnished, the court relied upon the language of the federal statutes creating the SSI program as well as the congressional purpose in enacting the program.¹²⁸ In vacating the garnishment order, the court said that 42 U.S.C. § 1383(d)(1) and § 407(a) prohibited the garnishment of SSI benefits.¹²⁹ The court also dismissed the argument that the provisions of § 407(a) had been waived by the Child Support Enforcement Act.¹³⁰ While the Act plainly makes Social Security disability benefits subject to child support orders, it does not clearly do so for SSI benefits.¹³¹ The difference is that "SSI payments are a form of public assistance and have nothing to do with earnings a person may have had."¹³² While Social Security disability benefits depend upon how much a beneficiary has

S.W.2d 594 (Tenn. 1990); *Langlois v. Langlois*, 441 N.W.2d 286 (Wis. Ct. App. 1989); see also *infra* notes 124-70 and accompanying text.

¹²² See *Peppel*, 493 S.W.2d at 576; *Young*, 802 S.W.2d at 599; *Langlois*, 441 N.W.2d at 288; see also *infra* notes 124-59 and accompanying text.

¹²³ See *infra* notes 124-59 and accompanying text.

¹²⁴ 802 S.W.2d 594.

¹²⁵ *Id.* at 595.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 597-98.

¹²⁹ *Id.* at 600.

¹³⁰ *Id.* at 596-97. For a discussion of the Child Support Enforcement Act, see *supra* notes 89-94 and accompanying text.

¹³¹ *Young*, 802 S.W.2d at 599.

¹³² *Id.* at 597.

contributed to the program,¹³³ “the amount of money to which an SSI recipient is entitled is contingent upon how little a person makes or has made rather than how much. An eligible SSI recipient’s benefits are the amount necessary to raise the recipient’s income to the prescribed minimum level.”¹³⁴

The *Young* court also distinguished SSI by pointing out that the statutory scheme behind SSI benefits “preempt[s] the application of state law in this situation because the issuance of legal process of any sort to reach these SSI funds, either payable or paid, would substantially frustrate the primary purpose of the SSI program.”¹³⁵ Furthermore, the goal of SSI is to provide some support for the impoverished who are eligible for the program, including those who do not qualify for Social Security disability benefits.¹³⁶ In addition, the legislative history of the program indicates that the enactors contemplated that an SSI recipient would have to apply for and be denied benefits under other public assistance programs before qualifying for SSI.¹³⁷

The court further emphasized the congressional purpose in designing the SSI program:

Because of the nature of the program’s mission, SSI recipients have a very low income level and little, if any, opportunity to raise that level because of their age or disability. Subtracting child support payments, in the variable amounts set by state trial judges, from this already low figure would reduce the individual recipient’s income below the “guaranteed minimum income level for aged, blind, and disabled persons” which is the essence of the legislative intent behind the SSI program.¹³⁸

The subtraction of child support from SSI benefits is particularly significant because SSI benefits provide only a subsistence level income and do not “raise the recipient above the poverty line.”¹³⁹

The *Young* court also pointed out that, in creating SSI benefits, Congress emphasized support for the individual.¹⁴⁰ In comparison,

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 598 (quoting *Schweiker v. Wilson*, 450 U.S. 221, 223-24 (1981)) (citation omitted).

¹³⁹ *Id.* at 597 n.1.

¹⁴⁰ *Id.* at 598.

AFDC, which was created at the same time, emphasized support for the family.¹⁴¹ In fact, AFDC "provides that payments to the children of disabled fathers are separate from payments to the disabled fathers themselves. Had it been the intent of Congress that SSI funds would also benefit the recipient's dependents, these payments obviously would not have been set up in this way."¹⁴²

In *Becker County Human Services v. Peppel*, a Minnesota court also relied upon federal statutory provisions excluding SSI benefits from garnishment in order to deny a local governmental agency the ability to recover child support from an SSI recipient.¹⁴³ The county government brought the action to collect child support from a parent whose children were in the foster care of the county.¹⁴⁴ A lower court took the non-custodial parent's SSI benefits, her only source of income, into account in ordering her to pay sixty-nine dollars per month toward the support of her children.¹⁴⁵ When she failed to make child support payments, the court threatened to hold her in contempt.¹⁴⁶ The Tennessee Supreme Court disagreed with this ruling and defined the term "legal process" in § 407(a)¹⁴⁷ to prohibit "implied or express threat[s] of formal legal sanction," including an order or threatened order to hold someone in contempt of court.¹⁴⁸

The *Peppel* court also rejected an analogy between a veteran's disability benefits, which can be attached for child support after the veteran has received the benefits, and SSI benefits.¹⁴⁹ The court distinguished the two benefit systems by saying that the protection of § 407(a), which applies to SSI benefits, extends to "benefits 'paid or payable,'" thereby eliminating the possibility that they might be attachable once the recipient has acquired them.¹⁵⁰ The court also considered the different purposes for which SSI and veterans' benefits are awarded.¹⁵¹ While SSI benefits "are awarded solely on the basis of need," veterans' disability

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ 493 N.W.2d 573, 574 (Minn. Ct. App. 1992).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* Peppel received \$407 per month in SSI benefits. *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See *supra* notes 87-88 and accompanying text.

¹⁴⁸ *Peppel*, 493 N.W.2d at 575.

¹⁴⁹ *Id.* at 576 (citing *Rose v. Rose*, 481 U.S. 619 (1987) (enabling a court to attach a veteran's benefits after the veteran has taken possession of them)).

¹⁵⁰ *Id.* (quoting 42 U.S.C. § 407(a) (1991)).

¹⁵¹ *Id.*

benefits are awarded based on length of employment.¹⁵² “[V]eterans’ benefits are intended to ‘provide reasonable and adequate compensation for disabled veterans and their families,’ while SSI benefits are awarded to protect only the recipient.”¹⁵³

Another court has held that qualification for SSI does not make one exempt from a court order to look for work,¹⁵⁴ when the income from that work could be used to award child support benefits.¹⁵⁵ In this case, the non-custodial parent argued that the federal government had determined that he was unable to work when it approved him for SSI benefits.¹⁵⁶ The non-custodial parent’s case was supported by the SSI statute which says that a person is “disabled,” and therefore eligible for benefits, only if the person cannot be gainfully employed.¹⁵⁷

In spite of this, the court upheld the order to look for work since the SSI statute does not specifically exclude the entry of a seek-work order against a recipient.¹⁵⁸ The court also pointed out that the recipient would only need to look for work; if his disability precluded him from qualifying for employment, he would not be in violation of the court order.¹⁵⁹

2. *Judicial Construction Aimed at Evading Statutory Provisions that Preclude Attachment of SSI Benefits for Child Support*

The primary exception to the general consensus among state courts that SSI benefits are not subject to attachment for the payment of child support is *Griggs v. Griggs*.¹⁶⁰ In *Griggs*, the non-custodial parent was a retarded man with no assets and an income of \$215 a month derived entirely from SSI benefits.¹⁶¹ The court, in sustaining a contempt order

¹⁵² *Id.*

¹⁵³ *Id.* (quoting *Rose*, 481 U.S. at 630) (citation omitted). “SSI benefits are designed to provide for the minimum needs of the individual recipient, and should not be considered income for any other purpose.” *Id.*

¹⁵⁴ *Langlois v. Langlois*, 441 N.W.2d 286, 288-89 (Wis. Ct. App. 1989). This court order, called a “seek-work” order, required the impoverished parent to “look for a job with the assistance of his vocational rehabilitation counselor.” *Id.* at 288.

¹⁵⁵ *Id.* at 288-89.

¹⁵⁶ *Id.* at 288.

¹⁵⁷ 42 U.S.C. § 1382c(a)(3)(B) (1991 & Supp. 1994); *see also supra* note 81.

¹⁵⁸ *Langlois*, 441 N.W.2d at 288.

¹⁵⁹ *Id.*

¹⁶⁰ 435 So. 2d 103 (Ala. Civ. App. 1983).

¹⁶¹ *Id.*

for nonpayment of court-ordered child support, held that SSI "may be subjected to a claim for past due child support payments."¹⁶²

Griggs evaded the prohibitive language of § 407(a) by interpreting it as a provision "protect[ing] benefits received from the claims of creditors."¹⁶³ The court relied upon Supreme Court decisions that "emphasize[d] that the purpose of an exemption statute, such as 42 U.S.C. § 407 (1976), is to protect the recipient and his family from the claims of creditors. Since family members fall into the protected category, there is no reason to allow the recipient to escape liability to his family."¹⁶⁴ The *Griggs* court also noted that claims for child support are more significant than those of creditors because "they are 'a duty of a higher obligation.'"¹⁶⁵

In *Whitmore v. Keeney*, a Pennsylvania court avoided having to construe 42 U.S.C. §§ 1381-1383 and § 407.¹⁶⁶ The *Whitmore* court read *Tennessee Department of Human Resources v. Young*¹⁶⁷ to "afford an option to the SSI recipient to pay for (familial) obligations with resources at his or her disposal, even if they [are] federal funds designed solely for his or her benefit."¹⁶⁸ *Whitmore* offers an alternate approach, as the court acknowledged that SSI benefits are not subject to attachment but nonetheless ordered child support to be paid since the non-custodial parent stated an ability to pay support on a monthly basis.¹⁶⁹ The court even considered SSI benefits received by the non-custodial parent's roommate as one of the parent's "other sources of income."¹⁷⁰

The different approaches employed by the *Young* and *Griggs* courts emphasize two different constituencies. In *Young*, the court protects the impoverished person from the additional burden of providing for a child. This approach, however, neglects the needs of the children who were brought into the world by the non-custodial parent and who are more vulnerable to the perils of poverty because they are helpless to support themselves. The *Griggs* approach, on the other hand, fails to consider that if the non-custodial parent is unable to support himself or herself, it is

¹⁶² *Id.* at 104.

¹⁶³ *Id.*

¹⁶⁴ *Id.* (construing *Wissner v. Wissner*, 338 U.S. 655 (1950)).

¹⁶⁵ *Id.* (quoting *Schlaefter v. Schlaefter*, 112 F.2d 177 (D.C. Cir. 1940)).

¹⁶⁶ 626 A.2d 1180 (Pa. Super. Ct. 1993).

¹⁶⁷ *Id.* at 1185 (citing *Young*, 802 S.W.2d 594, 599 (Tenn. 1990)).

¹⁶⁸ *Id.*; see *Young*, 802 S.W.2d at 599 (ruling that the person eligible for SSI benefits can "spend these funds anyway she or he chooses").

¹⁶⁹ *Whitmore*, 626 A.2d at 1185.

¹⁷⁰ *Id.*

unlikely that he or she will be able to support any children.¹⁷¹ In states without statutory guidance, reconciling these competing interests is difficult for a court.

D. Statutory Schemes in Other States: A Contrast with Kentucky

Many states, unlike Kentucky, have excluded, through either statute or administrative rule, the use of SSI benefits from the computation of gross income for the purposes of awarding child support.¹⁷² For example, Ohio's child support statute excludes SSI benefits from gross income:

"Gross income" does not include any benefits received from means-tested public assistance programs, including, but not limited to, aid to families with dependent children, *supplemental security income*, food stamps, general assistance, or disability assistance, does not include any benefits for any service-connected disability under a program or law administered by the United States department of veterans' affairs or veterans' administration, . . . [and] does not include any child support received for children who were not born or adopted during the marriage at issue¹⁷³

Ohio's statute is even more generous to recipients of public assistance than were Kentucky's provisions before amendment.¹⁷⁴ It is worth noting that while Ohio's statute places many forms of parental income out of the reach of children, it is not unique in that respect.¹⁷⁵

In *Langlois v. Langlois*, a non-custodial parent relied upon Wisconsin's statutory scheme to appeal a court order requiring him to use one

¹⁷¹ The solution imposed by the court in *Whitmore* is also problematic because the court took into account the fact that the non-custodial parent had a roommate with some income. This approach fails to recognize that, in living arrangements such as these, the income of a roommate might very well not go toward the support of the non-custodial parent.

¹⁷² E.g., COLO. REV. STAT. § 14-10-115(7)(I)(B) (1987 & Supp. 1994); MD. CODE ANN., FAM. LAW § 12-201(c)(5) (1991); N.M. STAT. ANN. § 40-4-11.1 (Michie 1994); N.Y. DOM. REL. LAW § 240(1-b)(b)(5)(vii)(F) (McKinney Supp. 1994); OHIO REV. CODE ANN. § 3113.215(A)(2) (Anderson 1993 & Supp. 1994); VT. STAT. ANN. tit. 15, § 653(5)(E)(ii) (1989); WASH. REV. CODE § 26.19.071(4)(e) (1994). But see D.C. CODE ANN. § 16-916.1 (1981 & Supp. 1994); FLA. STAT. ch. 61.30 (West Supp. 1994); MISS. CODE ANN. § 43-19-101 (Supp. 1993); MONT. CODE ANN. § 40-6-116 (1993).

¹⁷³ OHIO REV. CODE ANN. § 3113.215(A)(2) (emphasis added).

¹⁷⁴ See *supra* note 109.

¹⁷⁵ See, e.g., VT. STAT. ANN. tit. 15, § 653(5)(E)(ii); WASH. REV. CODE § 26.19.071(4)(e).

quarter of his SSI benefits for child support.¹⁷⁶ In overturning this order, the Wisconsin Court of Appeals relied upon a state administrative regulation prohibiting the use of income from public assistance benefits in the computation of gross income for child support.¹⁷⁷ The court evaluated the purpose of SSI benefits, especially the fact that SSI is paid out of federal funds, in order to determine whether SSI was a form of public assistance.¹⁷⁸ The *Langlois* court also looked at the intent behind the creation of SSI, stating, "The purpose of the program is to provide the recipient with minimum necessary financial resources. That purpose is defeated if the resource is depleted."¹⁷⁹

However, a subsequent Wisconsin court, while acknowledging that SSI benefits "cannot be burdened by a child support order,"¹⁸⁰ held that an individual could not avoid a contempt order for failing to make child support payments on the grounds that he derived his income exclusively from SSI benefits.¹⁸¹ The court sustained the order of contempt, saying that "the contemtor's total financial circumstances, including SSI payments, may be considered in determining his or her ability to purge the contempt order."¹⁸² Significant to the court was the fact that the issue of SSI benefits was raised not as a means of evading a child support order but rather as a means of vacating the contempt order.¹⁸³ Had the issue been raised when the court initially heard the matter, the non-custodial parent's dependence on SSI benefits might have allowed him to avoid the child support order.¹⁸⁴

By focusing on the contempt order, the court was able to avoid the statutory language that prohibits the use of income garnered from public assistance programs for an award of child support.¹⁸⁵ The court may

¹⁷⁶ 441 N.W.2d 286, 288 (Wis. Ct. App. 1989); *see also* *Youngblood v. James*, 883 S.W.2d 512 (Ky. Ct. App. 1994) (relying upon Kentucky child support guidelines before the 1994 amendment to hold that the guidelines precluded the award of child support against a parent whose only source of income was SSI).

¹⁷⁷ *Langlois*, 441 N.W.2d at 287 (relying on WIS. ADMIN. CODE § HHS 80.02(13)).

¹⁷⁸ *Id.* at 287-88.

¹⁷⁹ *Id.* at 288 (citation omitted).

¹⁸⁰ *Bork v. State*, No. 93-0067, 1993 WL 232366, *2 (Wis. Ct. App. June 29), *review denied*, 508 N.W.2d 423 (Wis. 1993) (quoting *Langlois*, 441 N.W.2d at 288).

¹⁸¹ *Id.*

¹⁸² *Id.* at *3.

¹⁸³ *Id.* at *2.

¹⁸⁴ *Id. Contra* *Esteb v. Enright*, 563 N.E.2d 139 (Ind. Ct. App. 1990) (holding that a court cannot collect on a child support order against a non-custodial parent who relied exclusively on SSI benefits for income).

¹⁸⁵ *Bork*, 1993 WL 232366, at *1-2; *see* WISC. STAT. § 49.41 (1987 & Supp. 1994) (providing the current version of the statute).

have been reluctant to excuse the non-custodial parent in this case because he had consistently failed to pay child support, having made no payments after 1985 despite frequent court orders to do so.¹⁸⁶ The non-custodial parent had also used his SSI payments over the years to make payments on a house, which the court believed was evidence "that even in the absence of the SSI payments, [he] had the ability to pay something toward the support arrearage."¹⁸⁷

CONCLUSION

Like the court in *Tennessee Department of Human Services v. Young*,¹⁸⁸ this Note "take[s] no pleasure in reaching the conclusion that a [parent] need not share at least some part of his [or her] income, however meager, with his [or her] minor child."¹⁸⁹ Even so, the automatic inclusion of SSI benefits in the parent's gross income, as provided for in Kentucky's child support guidelines,¹⁹⁰ is contrary to the federal statutory provisions regarding SSI benefits.¹⁹¹ In situations like these, where a child lives in poverty and his or her parent is too poor to help, no solution will remedy the entire problem. No matter how much or how little the court awards, both parties will remain poor.

The best solution is to take the financial abilities and needs of both the non-custodial parent and the child into account, including any public assistance for which either or both might be eligible. The child support statutes of many states already allow for the imposition of support if the parent is voluntarily impoverished.¹⁹² These provisions should be adequate to enforce child support against a parent who is able, though unwilling, to make payments for the maintenance of the child. Once the financial abilities are taken into account, the court should look at the child's remaining need and award any support the non-custodial parent can provide without falling below the subsistence level. Any amount that causes the parent to fall below the subsistence level benefits neither party because it places the parent in a position where he or she must struggle to survive and gives neither parent nor child hope for the future.

Rachael K. House

¹⁸⁶ *Id.* at *1.

¹⁸⁷ *Id.* at *4.

¹⁸⁸ 802 S.W.2d 594; see *supra* notes 124-42 and accompanying text.

¹⁸⁹ *Young*, 802 S.W.2d at 600.

¹⁹⁰ See *supra* notes 109-20 and accompanying text.

¹⁹¹ See *supra* notes 77-100 and accompanying text.

¹⁹² See *supra* notes 52-66 and accompanying text.

